Supreme Court, U.S.
FILED

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No._____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

In re:

MARK S. DORNFRIED, Petitioner.

PETITION FOR A WRIT OF MANDAMUS
or alternatively
PROHIBITION

Mark S. Dornfried
16720 Stuebner Airline Rd., # 185
Spring, TX 77379
Telephone and Fax No.: (281) 251-6534

Pro se Petitioner

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67 pp

QUESTIONS PRESENTED FOR REVIEW

Whether a Bankruptcy Court and/or District Court without a properly authorized bankruptcy petition has jurisdiction to conduct a bankruptcy proceeding ?

Absent such properly authorized bankruptcy petition whether a Bankruptcy Court and/or District Court is required to dismiss the bankruptcy case ?

Whether a Bankruptcy Court and/or District Court without a partnership bankruptcy petition has jurisdiction to administer and sell the assets of a partnership under 11 U.S.C. § 363(h) absent the consent of all of the general partners ?

Whether a Bankruptcy Court and/or District Court without a partnership bankruptcy petition can administer and sell the assets of a partnership under 11 U.S.C. § 363(h) and keep the sales proceeds and other monies belonging to the partnership ?

CERTIFICATE OF PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 14(1)(b) the undersigned hereby certifies that the following listed persons are parties to the proceeding in the court whose judgment is sought to be reviewed.

Mark S. Dornfried, pro se[1]

Bammel Builders, Inc.

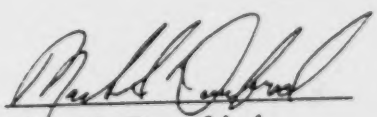
Southwest Residential Capital, Inc.

Texas Realty Partners-89, Inc.

James W. Stratton, Debtor

Rodney Tow, Attorney, Trustee for the Estate of James W. Stratton

Richard Simmons, United States Trustee



Mark S. Dornfried
Petitioner

[1] Mark S. Dornfried, Petitioner, is hereinafter referred to as "Dornfried".

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

CERTIFICATE OF PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi
Cases vi
Constitutional Provisions x
Statutes, Rules, and Regulations xi
Other Authorities xiii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 4

STATEMENT 5

I) THE CONNECTICUT CASE, CASE NO. 94-20020; IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF CONNECTICUT 5

II) THE TEXAS CASE, CASE NO. 95-40191-H4-7; IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS AT HOUSTON, TEXAS 7
Appeal No. H-97-239 13

III) THE COURT'S FINAL DETERMINATION OF PARTNERSHIP 13

IV) THE CLAIMS REGISTER IN BANKRUPTCY CASE NO. 95-40191-H4-7 14

V) SELLING PARTNERSHIP PROPERTY UNDER SECTION 363 OF THE BANKRUPTCY CODE 15
After Notice and a Hearing 15

REASONS FOR GRANTING THE PETITION 16

I) A PARTNERSHIP IS A DISTINCT LEGAL ENTITY 16

II) MR. STRATTON DID NOT, AND LEGALLY COULD NOT, FILE A PARTNERSHIP BANKRUPTCY PETITION UNDER TEXAS LAW 19

III) THE FINAL AND IRREVERSIBLE EFFECT OF 11 U.S.C. § 363(m) 20

IV) ANY CLAIMS AGAINST THE PARTNERSHIP MUST BE PRESENTED TO THE PARTNERSHIP ... 20

V) THE RIGHTS OF A PARTNER, NOT BANKRUPT, UNDER THE UNIFORM PARTNERSHIP ACT 21

VI) THE BANKRUPTCY CLAUSE AND THE FIFTH AMENDMENT 22
Article I: The Bankruptcy Clause 23
The Fifth Amendment: The Takings Clause 24

CONCLUSION - WHY THE WRIT SHOULD ISSUE 26

APPENDIX

Fifth Circuit Mandate denying Petition for Mandamus .... App. 1

U.S. District Court Order of Dismissal ..... App. 2

U.S. Bankruptcy Court Order Denying Dismissal ..... App. 7

U.S. Bankruptcy Court Order on Trustee' Motion for Authority to Conduct Business & Clerk's Cert. of Mailing . App. 8/9

11 U.S.C. § 101(41) ..... App. 10

11 U.S.C. § 303 ..... App. 10

11 U.S.C. § 303(d) ..... App. 11

11 U.S.C. § 361 ..... App. 11

11 U.S.C. § 363(a) ..... App. 12

11 U.S.C. § 363(c)(2) ..... App. 12

11 U.S.C. § 363(c)(4) ..... App. 13

11 U.S.C. § 363(h) ..... App. 13

11 U.S.C. § 721 ..... App. 14

11 U.S.C. § 723 ..... App. 14

Bankruptcy Rule 1004 ..... App. 14

Bankruptcy Rule 1010 ..... App. 15

Bankruptcy Rule 1011 ..... App. 16

Connecticut Bankruptcy Local Rule 10 ..... App. 17

Texas Revised Partnership Act, Vernon's Texas Statutes and Codes Ann., Art. 6132b, § 2.01 ..... App. 17

Texas Revised Partnership Act, Vernon's Texas Statutes and Codes Ann., Art. 6132b, § 2.04 ..... App. 18

Texas Uniform Partnership Act, Vernon's Texas Statutes and Codes Ann., Art. 6132b, § 25 ..... App. 19

Texas Uniform Partnership Act, Vernon's Texas Statutes and Codes Ann., Art. 6132b, § 31 ..... App. 20

Texas Uniform Partnership Act, Vernon's Texas Statutes and Codes Ann., Art. 6132b, § 35 ..... App. 21

Texas Uniform Partnership Act, Vernon's Texas Statutes and Codes Ann., Art. 6132b, § 37 ..... App. 22

Texas Uniform Partnership Act, Vernon's Texas Statutes and Codes Ann., Art. 6132b, § 40 ..... App. 23

TABLE OF AUTHORITIES

Cases:

Berman v. Parker, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954) 24

Brandt & Brandt Printers v. Klein, C.A.2 (N.Y.)1955, 220 F.2d 935 22

Carter v. Whisler, 275 Fed. 743, 746-747 (8th Cir. 1921) 27

Catlin v. United States, 324 U.S. 229, 233 (1945) 2

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) .. 2

Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863 (1994) 2

Ex parte Hartz, Fed.Cas.No.6,174, D.C.N.Y. 1842 12

Fidelity Trust Co. v. Gaskell, 195 F. 865, 115 C.C.A. 527, C.C.A.Mo. 1912 17

First Nat. Bank of Waterloo v. Bacon, 98 N.Y.S. 717, 113 A.D. 612, affirmed 82 N.E. 1126, 189 N.Y. 533, affirmed Zartman v. First Nat. Bank of Waterloo, 30 S.Ct. 368, 216 U.S. 134, 54 L.Ed. 418, 1906 9

Francis v. McNeal, 228 U.S. 695 (1913) 27

Grannis v. Ordean, 234 U.S. 385, 394 (1914) 15

Harper v. Fikes, 336 S.W.2d 631, ref. n.r.e., Tex.Civ.App. 1960 .. 9

Humphrey v. Bullock, 666 S.W.2d 586, 590 (Tex.App-Austin 1984, writ ref'd n.r.e.) 18

In re Aboussie Bros. Const. Co., 8 B.R. 302, D.C.Mo. 1981 17

In re Alpine Lumber and Nursery, 5 C.B.C.2d 141, 13 B.R. 977, 979, Bkrtcy. S.D.Cal 1981 11

In Re Al-Wyn Food Distributors, Inc., Debtor, 8 B.R. 42, Bkrcy. M.D.Fla., 1980 11

In re American International Industries, Inc. d/b/a Fashion Industries, Debtor, 10 B.R. 695, Bkrcy. S.D.Fla. 1981 11

In re Baker, 54 B.R. 743, 746, Bkrcy. E.D.Tenn. 1985 11

In re Butts, 46 B.R. 292, Bkrtcy,N.D. 1985 10

In re Central Medical Center, Inc., 122 B.R. 568, Bkrtcy.E.D.Mo. 1990 8

In re Cloverleaf Properties, 17 C.B.C.2d 1183, 9th Cir. BAP, 1987 13

In re Crescent Beach Inn, Inc., Debtor, 22 B.R. 155, Bkrcy. D.Maine, 1982 11

In re Dolton Lodge Trust, 22 B.R. 918 (Bkrtcy.Ill. 1982) 12

In re Dreske, 25 Bankr. 268 (Bankr. Wis. 1982) 17

In re Dynamic Technologies Corp., 106 B.R. 994, Bkrtcy.D.Minn. 1989 10

In re Fulton, 43 B.R. 273, 276 (Bkrtcy.M.D.Tenn.1984) 18

In re Funneman, 155 B.R. 197, Bkrtcy.S.D.Ill.1993 19

In re Gaghon, 26 Bankr. 926 (Bankr. Penn. 1983) 17

In re Gifford, 669 F.2d 468 (7th Cir. 1982); reh. en banc, 688 F.2d 447 24

In re Ginsberg, 219 F.2d 472, C.A.Pa. 1955 17

In re Joseph Feld & Co., 38 F.Supp. 506, D.C.N.J., 1941 11

In re Kane, 167 B.R. 224, Bkrtcy.D.Kan. 1993 17

In re Manning, 37 Bankr. 755 (Bankr. Co. 1984) 17

In re Martin, Fed.Cas.No.9,150, 6 Ben. 20, D.C.N.Y. 1872 12

In re Memphis-Friday's Assoc., 18 C.B.C.2d 1360 (B. Ct., W.D. Tenn. 1988) 12

In re Moore, Fed.Cas.No.9,750, 5 Biss. 79, D.C.Ill. 1869 12

In re Murchison, 54 B.R. 721, (Bkrtcy. N.D.Tex.1985) 18

In re Negri, 27 B.R. 941 (Bankr. E.D.N.Y. 1983) 25

In re Olszewski, 124 B.R. 743, Bkrtcy.S.D.Ohio 1991 19

In re Palmer, 2 F.Supp. 275, D.C.N.Y. 1932 17

In re Palumbo, 154 B.R. 357, Bkrtcy.S.D.Fla.1992 19

In re Psychotherapy and Counseling Center, Inc., 195 B.R. 522, (Bkrtcy.D.Dist.Col. 1994) 10

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In re Signal Hill-Liberia Ave. Ltd. Partnership, 189 B.R. 648, Bkrtcy.E.D.Va.1995 19

In re Venture Properties, Inc., 37 B.R. 175 (Bankr. D. New Hampshire 1984) 18, 28

In re Victory Pipe Craftsmen, Inc., 12 Bankr. 822 (Bankr. Ill. 1981) 16, 17

In re Wallen, 43 B.R. 408 (Bankr. D. Idaho 1984) 21, 28

In the Matter of Great Northwest Development Co., Debtor, 28 B.R. 14, Bkrcy. E.D. Mich S.D., 1983 11

Johnson, et al v. Jones, 515 U.S. 304 (1995) 2

Lancaster v. Key, 24 B.R. 897, D.C.Tenn. 1982 10

Lauro Lines s.r.l. v. Chasser, et al, 490 U.S. 495 (1989) 2

Liberty National Bank of Roanoke, Virginia v. James T. Bear, 276 U.S. 215, 48 S.Ct. 252, 72 L.Ed. 536, 1927 28

Littleton v. Littleton, 341 S.W.2d 484, 488 (Tex.Civ.App.-Houston 1960, writ ref'd n.r.e.) 18

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Manson v. Williams, 213 U.S. 453 (1909) 27

Matter of Elsub Corp., 66 B.R. 172, Bkrtcy.D.N.J. 1986 17

Matter of Kemp, 52 F.3d 546, C.A.5 (Tex.) 1995 9

Matter of Minton Group, 46 B.R. 222, 225 (S.D.N.Y.1985) 18

Matter of Phillips, 966 F.2d 926, 27 C.B.C.2d 464 (5th Cir. 1992) 20, 22

Matter of Sanders, 969 F.2d 591, C.A.7 (Ill.) 1992 10

Meek v. Centre County Banking Co., 268 U.S. 426, 45 S.Ct. 560, 69 L.Ed. 1028, U.S.Pa. 1925 17

Midland Asphalt Corp. v. United States, 489 U.S. 794, 798 (1989) 2

Miller v. Howell, 234 S.W.2d 925, 930 (Tex.Civ.App.-Ft. Worth 1950, no writ) 18

Mills v. J.H. Fisher & Co., 159 F. 897, 87 C.C.A. 77, 16 L.R.A.(N.S.) 656, C.C.A.Tenn. 1908 20

Price v. Gurney, 324 U.S. 100, 1945 11

Resolution Trust Corp. v. Security Town Co., 745 F.Supp. 1216, E.D.La. 1990 17

Richardson-Merrell, Inc. v. Koller, 472 U.S. 424 (1985) 2

Rodrock v. Security Industrial Bank, 642 F.2d 1193 (10th Cir. 1981) 24

Security First Nat. Bank v. Whittaker (App. 4 Dist. 1966) 241 Cal.App.2d 554, 50 Cal.Rptr. 652 22

Security Industrial, 459 U.S. 70, 103 S.Ct. 407 24

Stickney v. Kerry (1960) 55 Wash.2d 535, 348 P.2d 655 22

Tatum et al v. Acadian Production Corporation of Louisiana, 35 F.Supp 40, E.D.La. 1940 17

Terry Oilfield Supply Co., Inc. v. American Sec. Bank, N.A., 195 B.R. 66, S.D.Tex. 1996 10

The New England Divisions Case, Akron, C. & Y.R. Co. v. United States, 261 U.S. 184, 200 (1923) 15

Titus v. Maxwell, 281 F. 433, C.C.A.Mich. 1922 17

United States v. MacDonald, 435 U.S. 850, 860 (1978). 2

Van Cauwenberghe v. Baird, 486 U.S. 517, 521 (1988) 2

Westinghouse Credit Corp. v. Hall, 144 B.R. 568, S.D.Ga. 1992 17

Constitutional Provisions:

Article III 24

Bankruptcy Clause 23, 24, 26

Bill of Rights 24

Due Process 24

Fifth Amendment 15, 23-25, 27

Takings Clause 23-26

U.S.C.A. Const.Amend. 5 23

U.S.C.A. Const.Art. 1, § 8, cl. 4 23

Statutes, Rules, and Regulations:

11 U.S.C. § 101(41) 15, 17

11 U.S.C. § 102(1) 15

11 U.S.C. § 109(b) 17

11 U.S.C. § 109(d) 17

11 U.S.C. § 301 ..... 10, 26, 28

11 U.S.C. § 303(b)(3) 10, 26, 28

11 U.S.C. § 303(b)(3)(B) 27

11 U.S.C. § 303(d) 12

11 U.S.C. § 349(b) 3, 29

11 U.S.C. § 361 ..... 10, 27

11 U.S.C. § 363 ..... 15-17, 23-25

11 U.S.C. § 363(c)(2) 10, 27

11 U.S.C. § 363(c)(4) 10, 27

11 U.S.C. § 363(h) 15, 17

11 U.S.C. § 363(m) 3, 20

11 U.S.C. § 541(a)(1) 9, 21

11 U.S.C. § 542 27

11 U.S.C. § 707 ..... 3, 29

11 U.S.C. § 721 ..... 8, 9

11 U.S.C. § 723 ..... 10, 27

28 U.S.C. § 1334 ..... 1, 26

Bankruptcy Act of 1841 12

Bankrupt Law of March 2, 1867 28

Bankruptcy Act of July 1, 1898 28

Bankruptcy Act § 5(h) (Comp.St. § 9589) 28

Connecticut Bankruptcy Local Rule 10 11

Federal Rule of Civil Procedure 6(d) 9, 16

Federal Rule of Civil Procedure 65 16

Rule of Bankruptcy Procedure 1004 ..... 11, 13, 26, 27

Rule of Bankruptcy Procedure 1010 ..... 12, 27

Rule of Bankruptcy Procedure 1011 ..... 12, 27

Rule of Bankruptcy Procedure 7065 16

Texas Revised Partnership Act, Vernon's Texas Statutes and Codes Ann., Art. 6132b-2.01 21

Texas Revised Partnership Act, Vernon's Texas Statutes and Codes Ann., Art. 6132b-2.04 22

Texas Uniform Partnership Act §§ 6, 7, 8 17

Texas Uniform Partnership Act, Vernon's Texas Statutes and Codes Ann., Art. 6132b, § 25 18

Texas Uniform Partnership Act, Vernon's Texas Statutes and Codes Ann., Art. 6132b, § 31 ..... 19, 22

Texas Uniform Partnership Act, Vernon's Texas Statutes and Codes Ann., Art. 6132b, § 35(3)(b) 19

Texas Uniform Partnership Act, Vernon's Texas Statutes and Codes Ann., Art. 6132b, § 37 22

Texas Uniform Partnership Act, Vernon's Texas Statutes and Codes Ann., Art. 6132b, § 40 21

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1A Collier on Bankruptcy § 5.03 (14th ed.) 17

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American Constitutional Law (2d ed. 1988) 24, 25

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Mark S. Dornfried respectfully petitions this Court for a writ of mandamus or alternatively prohibition [2].

OPINIONS BELOW

On March 27, 1998 the United States Court of Appeals for the Fifth Circuit denied Dornfried's Petition for a Writ of Mandamus. App. 1.

JURISDICTION

The jurisdiction of this Court is founded upon *28 U.S.C. § 1651*, *28 U.S.C. § 1334*, and *Supreme Court Rule 20.*

Dornfried and the partnership of Dornfried and James W. Stratton are not debtors or creditors in any bankruptcy case. Dornfried and the Partnership assert that the Bankruptcy Court, District Court, and Circuit Court of Appeal's decisions to refuse to dismiss the bankruptcy case is appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action (the bankruptcy case) and does not require consideration with it. The decisions of the courts below have a final and irreparable effect on the rights of Dornfried and the partnership that are not correctable on an appeal at a later time. If and when that time comes; presumably after all of the partnership properties are sold, the money is distributed, and the bankruptcy case is closed; it will be too late to effectively review the present order and Dornfried's and the partnership's rights will have

[2] In order to avoid any question, Dornfried seeks both writs of mandamus and prohibition cumulatively or in the alternative. See *Stern, Gressman and Shapiro, Supreme Court Practice (6th ed. 1986), § 11.2.*

been lost, irreparably. The legal and practical value of Dornfried's and the partnership's rights will be destroyed if not vindicated before the properties are sold and the case closes. Please see *Midland Asphalt Corp. v. United States, 489 U.S. 794, 798 (1989)* quoting *United States v. MacDonald, 435 U.S. 850, 860 (1978).*

In certain specific statutory schemes, such as bankruptcy and probate, there is no trial and there is no final judgment as defined in Title 28 U.S.C. § 1291. For purposes of § 1291, a final judgment is generally regarded as a decision by the district court that ends the litigation on the merits and leaves noting for the court to do but execute the judgment. *Lauro Lines s.r.l. v. Chasser, et al, 490 U.S. 495 (1989)* quoting *Van Cauwenberghe v. Baird, 486 U.S. 517, 521 (1988)* quoting *Catlin v. United States, 324 U.S. 229, 233 (1945).*

The orders of the Courts below fall within that narrow exception to the rule of non-appealability under the collateral order doctrine. The Court's decisions fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action which are too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. Please see *Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949); Richardson-Merrell, Inc. v. Koller, 472 U.S. 424 (1985); Johnson, et al v. Jones, 515 U.S. 304 (1995); Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863 (1994).*

The denial of Dornfried's Motion to Dismiss and of Dornfried's Petition for a Writ of Mandamus in the U.S. Court of Appeals for the Fifth Circuit satisfy the three conditions held as the *Cohen* exception in that they:

- "conclusively determine the disputed question";
- "resolve an important issue completely separate from the merits of the action; and
- "are effectively unreviewable on appeal from a final judgment."

Mandamus or Prohibition is appropriate where the relief cannot be obtained by appeal, as is the case here. The U.S. Bankruptcy Court for the Southern District of Texas is selling the partnership properties and keeping the proceeds. Dornfried timely objected to the sales and his objection was overruled. The Bankruptcy Court refused to stay the sales pending appeal.

11 U.S.C. § 363(m) states:

> (m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

This Petition for a Writ of Mandamus or Prohibition seeks a reversal of the denial of Dornfried's Motion to Dismiss an unauthorized and improperly commenced bankruptcy case. Dornfried has exhausted all other available remedies. The relief sought is not available in any other court because Dornfried has previously petitioned every other court unsuccessfully.

Dornfried respectfully petitions this Court to issue a Writ of Mandamus or Prohibition to require the United States District Court and United States Bankruptcy Court for the Southern District of Texas to dismiss a bankruptcy case that was not authorized by all of the general partners as required by law. Because there is no partnership bankruptcy petition and the case was commenced without proper authorization bankruptcy Case No. 95-40191-H4-7 should be dismissed pursuant to *11 U.S.C. § 707*. This Court should order the return of the property that is not owned by James W. Stratton pursuant *11 U.S.C. § 349(b)*. No prejudice will result to any party by the granting of this Writ of Mandamus or Prohibition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides, in relevant part, that "nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Title 11 of the United States Code is extensively involved as to the following statutes: 11 U.S.C. § 101(41) regarding the definition of "person" that includes a partnership; 11 U.S.C. § 102(1) regarding the meaning of the term "After Notice and Hearing"; 11 U.S.C. § 301 regarding Commencement of a Case; 11 U.S.C. § 303 regarding Commencement of Involuntary Cases and partnerships; 11 U.S.C. § 361 regarding Adequate Protection; 11 U.S.C. § 363 regarding the Use, Sale, or Lease of Property; 11 U.S.C. § 542 regarding Turnover of Property to the Estate; 11 U.S.C. § 721 regarding Authorization to Operate a Business; and 11 U.S.C. § 723 regarding the Rights of a partnership trustee against general partners.

Title 28 of the United States Code § 1334 is involved insofar as it confers jurisdiction on the District Court regarding cases under Title 11.

The Bankruptcy Act of 1841, the Bankrupt Law of March 2, 1867, the Bankruptcy Act of July 1, 1898, the Bankruptcy Act (1898) § 5(h) (Comp.St. § 9589), and the Bankruptcy Act of 1938, are involved for statutory and case citations and historical comparisons to the Bankruptcy Code of 1978.

The Bankruptcy Rules are involved as to the following rules: Bankruptcy Rule 1004 regarding Partnership Petitions; Bankruptcy Rule 1010 regarding the Service of Involuntary Petitions and Summons; Bankruptcy Rule 1011 regarding Responsive Pleadings or Motions in Involuntary Cases; and Connecticut Bankruptcy Local Rule 10

regarding Corporate or Partnership Resolutions authorizing bankruptcy petitions.

The following Texas Statutes are involved: Texas Revised Partnership Act, Art. 6132b-2.01 regarding Partnerships as Separate Entities; Texas Revised Partnership Act, Art. 6132b-2.04 regarding Partnership Property is not Property of the Partners; Texas Uniform Partnership Act §§ 6, 7, 8 regarding Partnerships as a Distinct Legal Entity; Texas Uniform Partnership Act, Art. 6132b § 25 regarding the Nature of a Partner's Right in Specific Partnership Property; Texas Uniform Partnership Act, Art. 6132b § 31 regarding the Causes of Dissolution of a partnership; Texas Uniform Partnership Act, Art. 6132b § 35 regarding the Power of a Partner to Bind a Partnership to Third Persons After Dissolution; Texas Uniform Partnership Act, Art. 6132b, § 37 regarding the Right to Wind Up a partnership; Texas Uniform Partnership Act, Art. 6132b, § 40 regarding the Rules for Distribution for settling accounts between partners.

STATEMENT

This petition is a result of the administration of a bankruptcy case filed by James W. Stratton. $23,669,405.00 of cash and property that belonged to the partnership and did not belong to James W. Stratton was improperly taken by the Bankruptcy Court. Mr. Stratton owned solely the property that was returned to him as exempt and $272,000.00 worth of real estate located in the State of Florida.

I) THE CONNECTICUT CASE, CASE NO. 94-20020; IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF CONNECTICUT

Commencing in the mid-1980's Dornfried and James W. Stratton became partners in various general partnerships. Mr. Stratton lost a lawsuit captioned Jacqueline D. Miley v. James W. Stratton, In the County Civil Court at Law No. 1 of Harris County, Texas, Docket No.

578,476, on April 15, 1992. Mr. Stratton pursued various appeals. In December 1993 Mr. Stratton's appeal to the Supreme Court of the State of Texas failed.

On January 3, 1994, in order to avoid the Miley civil judgment that was about to be executed against him, Mr. Stratton filed a bankruptcy petition under Chapter 11 of the U.S. Bankruptcy Code in the United States Bankruptcy Court for the District of Connecticut, Case No. 94-20020. The name of the debtor on the face of the petition was *In re James W. Stratton*. To the question *All Other Names Used by the Debtor in the Last 6 Years ?* Mr. Stratton answered *dba First Houston Holdings*. To the question *Business Debtor's Principal Asset Location ?* Mr. Stratton answered *Not Applicable*. Under the section entitled *Information Regarding the Debtor* Mr. Stratton checked the boxes for *Debtor Type: [X] Individual* and *Debt Nature: [X] Non-Business/Consumer*. The section entitled *Pending Bankruptcy Case Filed by any Spouse, Partner, or Affiliate of the Debtor* was answered *None*. On the face of the petition following box was signed:

INDIVIDUAL DEBTOR

I declare under penalty of perjury that the information provided in this petition is true and correct.

/s/ James W. Stratton
Debtor: James W. Stratton
Date: 1/3/94

The following box was unsigned.

CORPORATE OR PARTNERSHIP DEBTOR

I declare under penalty of perjury that the information in this petition is true and correct and that the filing of this petition on behalf of the debtor has been authorized. {Emphasis added}.

/s/ [BLANK]
Signature of Authorized Individual
Name: [BLANK]

Title:	[BLANK]
Date:	[BLANK]

In his petition Mr. Stratton identified the $23,941,405.00 of property. Dornfried has never been to the Connecticut Bankruptcy Court.

On November 30, 1994, Mr. Stratton's Connecticut bankruptcy case was converted by the Bankruptcy Court in Connecticut to a case under Chapter 7 of the Bankruptcy Code. A few weeks later it was transferred to the United States Bankruptcy Court for the Southern District of Texas, Houston Division.

II) THE TEXAS CASE, CASE NO. 95-40191-H4-7; IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS AT HOUSTON, TEXAS

Mr. Rodney Tow, was appointed trustee for the Bankruptcy Estate of James W. Stratton on January 5, 1995.

The name of the debtor on the face of the petition filed in Case No 95-40191-H4-7, the transferred case, is *In re Stratton, James W.* To the question *All Other Names ?* Mr. Stratton answered *none.* To the question *Location of Principal Assets of Business Debtor ?* Mr. Stratton answered *N/A.* Under the section entitled *Information Regarding the Debtor* Mr. Stratton answered the question for *Type: Individual, Nature: Business,* and *Type of Business: Other Business.* The section entitled *Pending Bankruptcy Case Filed by any Spouse, Partner, or Affiliate* was answered *No Pending Bankruptcies.*

The following box was signed:

INDIVIDUAL OR JOINT DEBTOR(S)
I declare under penalty of perjury that the information provided in this petition is true and correct...
/s/ James W. Stratton
Debtor: James W. Stratton

Date: [BLANK]

There was no box on this petition for the signature of a Corporate or Partnership Debtor.

At no time did Dornfried or the Partnership file a bankruptcy petition. At no time did any business entity that Dornfried has ever been involved in file a bankruptcy petition.

On February 2, 1995 Mr. Rodney Tow filed Adversary Proceeding No. 95-4075. On February 16, 1995 at a Temporary Injunction hearing Judge William Greendyke signed a Temporary Injunction and Order that allowed Mr. Rodney Tow to collect the rent payments, mortgage payments, repair payments, and maintenance payments of the partnership. The Temporary Injunction granted Mr. Rodney Tow no other financial authority. The Court said Mr. Rodney Tow was to determine what the debtor owned and return all properties that the debtor did not own. Mr. Stratton owned the $272,000 worth of real estate located in the State of Florida. At that time Mr. Rodney Tow received the right to collect the aforementioned payments on approximately 400 real properties valued at $23,669,405.00; according to the financial statements on file with the Clerk's office and the U.S. Trustee. Mr. Tow was supposed to promptly return everything that Mr. Stratton didn't own but he never did.

A debtor may not use the bankruptcy section defining property of the estate to divest another of property to which he rightfully has title. *In re Central Medical Center, Inc., 122 B.R. 568, Bkrtcy.E.D.Mo. 1990.*

Concurrently with the filing of the complaint in Adversary Proceeding 95-4075 Mr. Rodney Tow filed a Motion for Authority to "Conduct the Business" of the Debtor under *11 U.S.C. § 721* with the Bankruptcy Court in the underlying Stratton bankruptcy case, not the Adversary Proceeding. Dornfried is not a debtor or creditor in the Stratton bankruptcy case. Dornfried has never filed a proof of claim because Mr. Stratton didn't owe him any money. Mr. Rodney Tow first

alluded to the fact that he filed the Motion for Authority to "Conduct the Business" at the hearing on February 16, 1995 at the moment Judge Greendyke signed the injunction. Dornfried vigorously objected to "Conducting the Business". No notice of the Motion for Authority to "Conduct the Business" of the Debtor as required by *Federal Rule of Civil Procedure 6(d)* was ever served on Dornfried. No notice of any hearing was ever served on Dornfried. The issue of Notice and Hearing is addressed later in this brief.

On March 11, 1995 (the Order was entered March 15, 1995), after an apparent hearing of which Dornfried was not notified and without Dornfried's knowledge, the "Order on Trustee' [sic] Motion for Authority to Conduct Business" was granted. App. 8. No copy of the order was mailed to Dornfried by the Clerk. App. 9. The order allowed Mr. Rodney Tow to operate the "business of the debtor" for an unlimited time period and for unlimited purposes. *11 U.S.C. § 721*, App. 14, only allows the Court to authorize the operation of the business of the debtor; and for a limited period. In other words, the debtor has to actually own the business that the trustee proposes to operate. The actual effect of the order was to create a partnership bankruptcy case without Dornfried's consent and without a partnership bankruptcy petition.

There is universal agreement that under *11 U.S.C. § 541* the property of bankruptcy estates is comprised of property owned by the debtor immediately prior to the filing of the petition.

> A bankrupt's trustee takes the bankrupt's property in the same condition and subject to the same liens as it was held by the bankrupt. *First Nat. Bank of Waterloo v. Bacon, 98 N.Y.S. 717, 113 A.D. 612, affirmed 82 N.E. 1126, 189 N.Y. 533, affirmed Zartman v. First Nat.Bank of Waterloo, 30 S.Ct. 368, 216 U.S. 134, 54 L.Ed. 418, 1906.* As a general rule, bankruptcy estates enjoy same rights that debtor held immediately prior to filing of bankruptcy. *Matter of Kemp, 52 F.3d 546, C.A.5 (Tex.) 1995.* The trustee in bankruptcy takes only such property as belongs to the bankrupt. *Harper v. Fikes, 336 S.W.2d 631, ref. n.r.e., Tex.Civ.App.*

1960. See also, *Terry Oilfield Supply Co., Inc. v. American Sec. Bank, N.A., 195 B.R. 66, S.D.Tex. 1996; Matter of Sanders, 969 F.2d 591, C.A.7 (Ill.) 1992; In re Psychotherapy and Counseling Center, Inc., 195 B.R. 522, Bkrtcy.D.Dist.Col. 1994; In re Dynamic Technologies Corp., 106 B.R. 994, Bkrtcy,D.Minn. 1989; Lancaster v. Key, 24 B.R. 897, D.C.Tenn. 1982. In re Butts, 46 B.R. 292, Bkrtcy,N.D. 1985.*

Dornfried could not understand how Mr. Rodney Tow was doing anything other than collecting rent payments, mortgage payments, repair payments, and maintenance payments under the Temporary Injunction. When Dornfried learned that Mr. Rodney Tow was not segregating cash collateral (defined in *11 U.S.C.* § *363(a),* App. 12) as required by *11 U.S.C.* § *363(c)(2)* and *(4),* App. 12 and 13, Dornfried promptly filed a Motion to Segregate funds. The motion was denied. Dornfried and the partnership never consented to the use of cash collateral as required by and *11 U.S.C.* § *363(c)(2).* App. 12. Dornfried filed a motion for "Adequate Protection" pursuant to *11 U.S.C.* § *361.* App. 11. The Bankruptcy Court denied the motion. On August 31, 1995 Dornfried's name and address were added to the docket in Adversary No. 95-4075 "for notice". Dornfried learned of the entry of the "Order on Trustee' [sic] Motion for Authority to Conduct Business" in January, 1997.

On December 2, 1996 Mr. Rodney Tow filed his Third Amended Complaint in Adversary No. 95-4075 alleging, inter alia, "Partnership by Estoppel". At no time were the requirements of *11 U.S.C.* § *301* and *11 U.S.C.* § *303(b)(3),* App. 10, complied with regarding authorization and commencement of a bankruptcy case as to any entity other than Mr. Stratton as an individual. Under *11 U.S.C.* § *301* a voluntary partnership bankruptcy petition can only be filed if all the general partners consent. There is no statutory provision for a trustee in bankruptcy to file a bankruptcy petition against a partnership unless all of the general partners are bankrupt. *11 U.S.C.* § *303(b)(3).* App. 10. There is no statutory provision for a trustee in bankruptcy of an individual partner to sue the other general partner(s) for claims that belong to the partnership and not the partner. *11 U.S.C.* § *723.* App 13.

At no time did Dornfried authorize or consent to the filing of a voluntary partnership petition under the *Rules of Bankruptcy Procedure 1004(a),* App. 14, or *Connecticut Bankruptcy Local Rule 10,* App. 17.

Authority to file a bankruptcy petition is founded in state law. A District Court must dismiss a bankruptcy case if the petition was not properly authorized.

> Where federal District Court finds that those who purported to act on behalf of corporation had not been granted authority by local law to institute proceedings for reorganization of corporation, the court has no alternative but to dismiss the petition... A bankruptcy court does not have jurisdiction to determine that those who in fact do not have authority to speak for corporation as a matter of local law are entitled to be given such authority... *Price v. Gurney, 324 U.S. 100, 1945.*
>
> The Court, however, should not assume jurisdiction of a "voluntary proceeding", which, as in this case, is based on an invalid resolution which had its origin in an illegal meeting of directors. *In re Joseph Feld & Co., 38 F.Supp. 506, D.C.N.J., 1941;* See also *In re Crescent Beach Inn, Inc., Debtor, 22 B.R. 155, Bkrcy. D.Maine, 1982; In Re Al-Wyn Food Distributors, Inc., Debtor, 8 B.R. 42, Bkrcy. M.D.Fla., 1980; In re American International Industries, Inc. d/b/a Fashion Industries, Debtor, 10 B.R. 695, Bkrcy. S.D.Fla. 1981; In the Matter of Great Northwest Development Co., Debtor, 28 B.R. 14, Bkrcy. E.D. Mich S.D., 1983.*

Ordinarily, a general partner may bind a partnership without consent of the other general partners. In bankruptcy, however, this rule is reversed; all general partners must consent for the partnership as a debtor to take a voluntary action. To conclude otherwise would result in a denial of due process to those non-joining general partners who are still liable for the partnership debts. *In re Seychelles, 30 B.R. 72, Bkrtcy. N.D.Tex., 1982.* See also *In re Baker, 54 B.R. 743, 746, Bkrtcy. E.D.Tenn. 1985. In re Alpine Lumber and Nursery, 5 C.B.C.2d 141, 13 B.R. 977, 979, Bkrtcy. S.D.Cal 1981.*

There is universal agreement that all partners must consent to the filing of a voluntary partnership bankruptcy petition.

> A decree in bankruptcy cannot be rendered against a firm on a voluntary application therefor, unless the whole of the partners unite therein. *Act 1841. Ex parte Hartz, Fed.Cas.No.6,174, D.C.N.Y. 1842.* One or more partners may file their petition praying that the firm be declared bankrupt, without making the others parties, but notice of the pendency of the proceedings must be given to the other parties. *In re Moore, Fed.Cas.No.9,750, 5 Biss. 79, D.C.Ill. 1869.* An adjudication of bankruptcy of a firm on the petition of one member is void as to members not consenting to the adjudication... *In re Martin, Fed.Cas.No.9,150, 6 Ben. 20, D.C.N.Y. 1872.* See also, *In re Dolton Lodge Trust No. 35188, 22 B.R. 918 (Bkrtcy.Ill. 1982); In re Memphis-Friday's Assoc., 18 C.B.C.2d 1360 (Bkrtcy.W.D. Tenn. 1988).*

At no time was Dornfried served a summons and petition pursuant to the *Rules of Bankruptcy Procedure 1010.* App. 15. At no time was Dornfried allowed to contest a petition pursuant to *11 U.S.C. § 303(d),* App. 11, or *Rules of Bankruptcy Procedure 1011.* App. 16.

> A general partner in a general partnership may not file a voluntary petition for bankruptcy without informing his other partners - even if an objecting partner attends the section 341 meeting of creditors (where the objecting partner was told by the trustee that it was uncertain whether or not he, as a partner, had any standing in the case)... with the result that the bankruptcy petition may be dismissed since procedural safeguards, which are not to be taken lightly, were not followed. A non-filing partner must receive a summons, either personally or by mail, notifying him of the filing of a bankruptcy petition and instructing him that if he wishes to contest the petition, he must file an answer within 20 days after service of the summons. In light of the above, we conclude that the Cloverleaf bankruptcy petition was improperly filed and that the bankruptcy court lacked jurisdiction to enter its turnover order. Accordingly, the order appealed from is vacated

and the case is remanded to the bankruptcy court for entry of an order dismissing the case. *In re Cloverleaf Properties, 17 C.B.C.2d 1183, 9th Cir. BAP, 1987.* {Emphasis added}.

Appeal No. H-97-239

Immediately after Mr. Rodney Tow filed the Third Amended Complaint alleging "Partnership by Estoppel", Dornfried, on December 5, 1996, filed a Motion to Dismiss the Petition (*Bankruptcy Rule 1004(a)*); thereby moving to dismiss bankruptcy case No. 95-40191-H4-7 because of Mr. Rodney Tow's partnership claims. Four (4) days later, on December 9, 1996 (the Order was entered December 11, 1996), the Bankruptcy Court, without notice or a hearing, denied Dornfried's motion. App. 7. Dornfried filed an appeal with the District Court, Case No. H-97-239.

In its Order of Dismissal entered April 15, 1997, App. 2, the District Court ruled that Dornfried had no standing to appeal the denial of the dismissal and that the District Court had no jurisdiction over the Bankruptcy Court's interlocutory order denying dismissal.

III) THE COURT'S FINAL DETERMINATION OF PARTNERSHIP

Two and one half (2½) years after the commencement of Adversary No. 95-4075 the Bankruptcy Court finally ruled that Dornfried and Mr. Stratton were partners. On September 3, 1997 the Bankruptcy Court entered a decision which held:

- Dornfried should be considered the managing partner of joint interests.

- Mark Dornfried and James Stratton conducted their businesses as partners prior to January 1, 1994.

- The partnership properties consisted of real property titled jointly, notes payable to both, liens held by both, and contracts or bonds for deed naming both as purchaser.

{Emphasis added}.

The judgment is final in all respects as to all parties regarding the determination of partnership.

None of the partnership properties or money were returned to Dornfried. None of the partnership properties or money were ever seen again. At the present time all of the funds and property in the possession of the trustee are derived from real property titled jointly, notes payable to both, liens held by both, and contracts or bonds for deed naming both as purchaser.

IV) THE CLAIMS REGISTER IN BANKRUPTCY CASE NO. 95-40191-H4-7

In late 1995 Mr. Rodney Tow solicited proofs of claim from various individuals and entities that were owed money by the partnership. Included were claims that arose both pre-petition, and post-petition caused by the improper acts of Mr. Rodney Tow. For the sake of simplicity Dornfried has addressed them all together as they all appear on the Claims Register.

The two hundred ninety three (293) claims submitted and existing on the Stratton Claims Register total $6,386,366.15. Of that amount, a $1,500,000 claim represents an unliquidated claim in a tort suit against Mr. Stratton. Of the remaining claims, the claims against Mr. Stratton's personal individual estate total $147,414.97.[3] The names of the five (5) individual Stratton creditors on the claims register are Claim No. 8-First Card-FCC National Bank; Claim No. 40-Jean B. & Carolyn R. Gordon; Claim No. 175-Continental Federal Credit Union; Claim No. 209-Manchester (CT) Collector of Revenue; and Claim No. 276-People's Bank. The remaining $4,738,951.18 of claims arise in one way or another out of the partnership business.

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[3] Ms. Miley who obtained the aforementioned judgement against Mr. Stratton which caused him to file for bankruptcy never submitted a claim.

V) SELLING PARTNERSHIP PROPERTY UNDER SECTION 363 OF THE BANKRUPTCY CODE

U.S. Bankruptcy Judge William Greendyke and Mr. Rodney Tow have begun selling the partnership properties under *11 U.S.C. § 363(h)*, App. 13, which authorizes the sale of property in which the debtor is a co-owner. A "Trustee's Expedited Complaint for Emergency Temporary Restraining Order and Preliminary Injunction" was filed in each instance. In some cases there was no "notice and a hearing" as required by *11 U.S.C. § 363.*

After Notice and a Hearing

The phrase "after notice and a hearing" is both a term of art and a rule of construction. As defined in *11 U.S.C. § 102(1)*, the phrase means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances. The importance of the concept and its centrality to the operation of the entire Bankruptcy Code can be gleaned from its repeated use in sixty four (64) distinct subsections of the Bankruptcy Code. The requirement of notice and a hearing is, in effect, a condition precedent to the performance of multifarious judicial and administrative functions effectuating the purposes behind the Code. Notice and an opportunity to be heard are the very essence of due process of law and go to the requisite standards of "due process" within the meaning of the *Fifth Amendment.*

> The fundamental requisite of due process of law is the opportunity to be heard. *Grannis v. Ordean, 234 U.S. 385, 394 (1914)*. See also *The New England Divisions Case, Akron, C. & Y.R. Co. v. United States, 261 U.S. 184, 200 (1923)*, in which Mr. Justice Brandeis defined a full hearing as "... one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken."

The procedural protections as to notice and hearing afforded to adverse parties by *Bankruptcy Rule 7065, Federal Rule of Civil Procedure 65* and *Federal Rule of Civil Procedure 6(d)* were never complied with.

A court of bankruptcy cannot sell the assets of a partnership without a bankruptcy petition. However, that is exactly what the Court has done and continues to do in this case. None of the funds from the sales of the partnership properties were ever seen again.

REASONS FOR GRANTING THE PETITION

I) A PARTNERSHIP IS A DISTINCT LEGAL ENTITY

Under partnership law, a partner's tenancy in the partnership is not an individual interest as a tenant in common, joint tenant, or tenant by the entireties. Partners own a general interest in the partnership similar to a shareholder's interest in a corporation, and not a specific interest in specific property. *In re Victory Pipe Craftsmen, Inc., 12 Bankr. 822 (Bankr. Ill. 1981);* see further *Crane & Bromberg, Law of Partnership § 40, at 228 (1968)* stating Although general partners have a right in specific partnership property as tenants in partnership, the incidents of this tenancy are so negligible that ownership of the property is, for all practical purposes, is in the partnership, not the partners.

A partner does not have a tenancy in specific partnership real property or other assets. The partnership, as a legal entity separate from the partners, owns partnership property, whereas, the partners, in turn, possess tenancies in the partnership. The general partners are not really co-owners of the property itself. They possess an undivided interest in the partnership as a whole and not an undivided interest in specific assets. Accordingly, *Section 363,* App. 13, is not an available mechanism by which a debtor partner may sell partnership property because the partners are not tenants in common, tenants by the entirety, or joint tenants as required by *Section 363.* Had Congress intended to authorize the Bankruptcy Court to sell a partnership's

property upon the filing of a bankruptcy petition by just one (1) general partner such authorization would be in *Section 363*. It is not there.

In bankruptcy cases, a partnership remains a distinct legal entity separate and apart from the partners who formed it. *11 U.S.C. §§ 101(41)*, App. 10, *109(b), (d)*; see also *Texas Uniform Partnership Act §§ 6, 7, 8*. There is universal agreement that under the bankruptcy code a partnership is a separate legal entity.

> Under *Bankruptcy Act § 5a (Comp.St. § 9589)*, partnership may be adjudged bankrupt as a distinct legal entity. *Meek v. Centre County Banking Co., 268 U.S. 426, 45 S.Ct. 560, 69 L.Ed. 1028, U.S.Pa. 1925*. Partnerships are considered to be separate and distinct juridical entities from their partners under Bankruptcy Code. *Resolution Trust Corp. v. Security Town Co., 745 F.Supp. 1216, E.D.La. 1990*. Under *Bankr. Act July 1, 1898*, a partnership is a distinct entity separate from the partners who compose it and from other partnerships composed in part of the same members. *Fidelity Trust Co. v. Gaskell, 195 F. 865,115 C.C.A. 527, C.C A.Mo. 1912*. See also, *In re Palmer, 2 F.Supp. 275, D.C.N.Y. 1932; Westinghouse Credit Corp. v. Hall, 144 B.R. 568, S.D.Ga. 1992; In re Kane, 167 B.R. 224, Bkrtcy.D.Kan. 1993. (11 U.S.C. § 101 (41), App. 10); In re Aboussie Bros. Const. Co., 8 B.R. 302, D.C.Mo.1981; Matter of Elsub Corp., 66 B.R. 172, Bkrtcy.D.N.J. 1986; In re Ginsberg, 219 F.2d 472, C.A.Pa. 1955; Titus v. Maxwell, 281 F. 433, C.C.A.Mich.1922; Tatum et al v. Acadian Production Corporation of Louisiana, 35 F.Supp 40, E.D.La. 1940.*

Even though section *363(h)* explicitly authorizes a trustee to sell both the estate's interest and the interest of any co-owners in property in which the debtor and the co-owners have an undivided interest, the section does not apply to a debtor partner who wishes to recover an undivided interest in partnership property. *In re Manning, 37 Bankr. 755 (Bankr. Co. 1984); In re Gaghon, 26 Bankr. 926 (Bankr. Penn. 1983); In re Dreske, 25 Bankr. 268 (Bankr. Wis. 1982); In re Victory Pipe*

Craftsmen, Inc., 12 Bankr. 822 (Bankr. Ill. 1981); see also *1A Collier on Bankruptcy § 5.03 (14th ed.).*

Under the *Texas Uniform Partnership Act, Vernon's Texas Statutes and Codes Ann., Art. 6132b, § 25,* App. 19, a partner is a co-owner with his partners of specific partnership property holding as a tenant in partnership. However, while a partner can possess specific partnership property for partnership purposes, he has no right to possess such property for any other purposes without the consent of his partners.

In a case very similar to this the U.S. Bankruptcy Court for the Northern District of Texas, Dallas Division, refused to sell property that belonged to a partnership because the Court had no jurisdiction. The Court clearly stated in *In re Murchison, 54 B.R. 721, (Bkrtcy. N.D.Tex.1985)*: It is, as counsel have grudgingly admitted, elemental law in Texas that specific assets of a partnership are not owned by a partner individually.

> The joint effects of a partnership, including realty, belong to the firm, and not to the partners, and a partner has no individual property in any specific assets of the firm, and no right during the existence of the partnership to the exclusive possession of any of its property. *The interest of each partner is his share in the surplus after the partnership debts are paid,* and after partnership accounts are settled and the rights of the partners inter se are adjusted.

Miller v. Howell, 234 S.W.2d 925, 930 (Tex.Civ.App.-Ft. Worth 1950, no writ). See also *Littleton v. Littleton, 341 S.W.2d 484, 488 (Tex.Civ.App.-Houston 1960, writ ref'd n.r.e.); Humphrey v. Bullock, 666 S.W.2d 586, 590 (Tex.App-Austin 1984, writ ref'd n.r.e.)* Bankruptcy Courts have consistently adopted these principals. See, e.g., *Matter of Minton Group, 46 B.R. 222, 225 (S.D.N.Y.1985); In re Venture Properties, Inc., 37 B.R. 175, 176 (Bkrtcy.N.H.1984); In re Fulton, 43 B.R. 273, 276 (Bkrtcy.M.D. Tenn.1984).*

Partnership property does not become property of an individual partner's bankruptcy estate. *In re Signal Hill-Liberia Ave. Ltd. Partnership, 189 B.R. 648, Bkrtcy.E.D.Va.1995; In re Funneman, 155 B.R. 197, Bkrtcy.S.D.Ill.1993; In re Palumbo, 154 B.R. 357, Bkrtcy.S.D.Fla. 1992; In re Olszewski, 124 B.R. 743, Bkrtcy.S.D.Ohio 1991.*

II) MR. STRATTON DID NOT, AND LEGALLY COULD NOT, FILE A PARTNERSHIP BANKRUPTCY PETITION UNDER TEXAS LAW

A bankrupt partner in Texas is without authority as a general partner to also file a petition on behalf of the partnership since Texas law precludes it. As the U.S. Court of Appeals for the Fifth Circuit recently held:

> Federal Law does not preempt Texas law with regard to authority-to-file disputes because they do not conflict. However, since state law determines issues concerning authority to file a bankruptcy petition, an individual who has already filed a personal bankruptcy petition in Texas is without authority as a general partner to also file a voluntary petition on behalf of a partnership since Texas law precludes it.
>
> Texas' Uniform Partnership Act provides that a "partnership is in no case bound by any act of a partner after dissolution... [w]here the partner has become bankrupt." *Tex.Rev.Civ.Stat.Ann. art. 6132b § 35(3)(b)*(Vernon 1970).[4] App. 21.
>
> Both the creditors and the partners are interested in the same partnership property. Thus, Texas, which alone regulates the creation and dissolution of business associations within its

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[4] Under Texas Law, the bankruptcy of any partner or the partnership causes dissolution of the partnership. *Tex.Rev.Civ.Stat. Ann. art. 6132b § 31(5)*. Thus, section *35(3)(b)* simply removes a bankrupt partner's authority to act on behalf of partnerships.

borders, logically protects non-bankrupt partners from bankrupt partners who acquire responsibility under federal bankruptcy law that could compromise the interests of the non-bankrupt partners. *Matter of Phillips, 966 F.2d 926, 27 C.B.C.2d 464 (5th Cir. 1992).*

III) THE FINAL AND IRREVERSIBLE EFFECT OF 11 U.S.C. § 363(m)

11 U.S.C. § 363(m) states:

> (m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

The Bankruptcy Court has refused to stay the sales of the partnership property pending appeal. However, a court of bankruptcy cannot administer the assets of a partnership without a bankruptcy petition. But that is exactly what the Court is doing in this case.

> Under Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U.S.Comp.St. 1901, p. 3418], when there is no adjudication against the firm, the partnership assets cannot be administered, if there be one member not adjudicated, unless he consents. *Mills v. J.H. Fisher & Co., 159 F. 897, 87 C.C.A. 77, 16 L.R.A.(N.S.) 656, C.C.A.Tenn. 1908.*

IV) ANY CLAIMS AGAINST THE PARTNERSHIP MUST BE PRESENTED TO THE PARTNERSHIP

Any claims against the non-bankrupt partnership must be presented to the partnership in the first instance during the winding up process. If, and only if, the partnership is unable to pay the debt, and if, and only if, Mr. Stratton has personal liability for the debt, may a

claim be submitted to Mr. Stratton's individual bankruptcy estate. However, from a practical point of view this rarely happens because since the bankrupt partner is unable to pay his share of the debt the remaining general partners get stuck having to pay for the bankrupt's share of liability. The *Texas Uniform Partnership Act, Vernon's Texas Statutes and Codes Ann., Art. 6132b, § 40,* App. 23, provides the Rules for Distribution upon the winding up of a partnership after dissolution and § *40(d)* specifically states:

Sec. 40. In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:

(d) The partners shall contribute, as provided by Section 18(a) the amount necessary to satisfy the liabilities; but if any, but not all, of the partners are insolvent, or, not being subject to process, refuse to contribute, the other partners shall contribute their share of the liabilities, and, in the relative proportions in which they share the profits, the additional amount necessary to pay the liabilities. {Emphasis added}.

V) THE RIGHTS OF A PARTNER, NOT BANKRUPT, UNDER THE UNIFORM PARTNERSHIP ACT

The commencement of a case under Title 11 of the United States Code creates an estate which is comprised of all legal or equitable interests of the debtor in property as of the commencement of the case. *11 U.S.C. § 541(a)(1).* The partnership interest which an individual holds at the commencement of a bankruptcy proceeding is part of that debtor's estate. However, the nature and extent of that partnership interest is determined by reference to state law. *In re Wallen, 43 B.R. 408 (Bankr. D. Idaho 1984).*

A partnership is an entity distinct from its partners. *Texas Revised Partnership Act, Vernon's Texas Statutes and Codes Ann., Art. 6132b-2.01.* App. 17. Partnership property is not property of the partners. Neither a partner nor a partner's spouse has an interest in partnership property.

Texas Revised Partnership Act, Vernon's Texas Statutes and Codes Ann., Art. 6132b-2.04. App. 18.

Under the *Texas Uniform Partnership Act, Vernon's Texas Statutes and Codes Ann., Art. 6132b, § 31(5),* App. 20, the bankruptcy of a partner causes a dissolution of the partnership, not a bankruptcy of the partnership.

> Bankruptcy of one partner works a dissolution of the firm, and solvent partner must promptly wind it up. *Brandt & Brandt Printers v. Klein, C.A.2 (N.Y.)1955, 220 F.2d 935.* Although the filing of a petition in bankruptcy works an immediate dissolution of a partnership, the trustee in bankruptcy does not acquire jurisdiction of the partnership property for purposes of winding up the partnership affairs if one or more of the partners is solvent. *Stickney v. Kerry (1960) 55 Wash.2d 535, 348 P.2d 655.* Nonbankrupt partner has the right to wind up partnership affairs, unless there is a different agreement. *Security First Nat. Bank v. Whittaker (App. 4 Dist. 1966) 241 Cal.App.2d 554, 50 Cal.Rptr. 652.*

Under the *Texas Uniform Partnership Act, Vernon's Texas Statutes and Codes Ann., Art. 6132b, § 37,* App. 22, the partners who have not wrongfully dissolved the partnership..., *not bankrupt*, has the right to wind up the partnership affairs.

As the U.S. Court of Appeals for the Fifth Circuit recently held:

> But Texas' legislature mandates that "the partners who have not wrongfully dissolved the partnership or the legal representative of the last surviving partner, *not bankrupt*, has the right to wind up the partnership affairs." *Tex.Rev.Civ.Stat.Ann. art. 6132b § 37,* App. 22, *Matter of Phillips, 966 F.2d 926, 27 C.B.C.2d 464 (5th Cir. 1992).*

VI) THE BANKRUPTCY CLAUSE AND THE FIFTH AMENDMENT

How does a person or entity, who is neither the debtor nor a creditor, lose everything in somebody else's bankruptcy ?

Under the *Takings Clause*,[5] private property cannot be taken other than for public use even if just compensation is paid. The power given to Congress by the *Bankruptcy Clause* [6] may not overstep limitations imposed by due process and the *Takings Clause* of the *Fifth Amendment*.

Article I: The Bankruptcy Clause

> "The Congress shall have power... [t]o establish ... uniform laws on the subject of bankruptcies throughout the United States. *U.S.C.A. Const. Art. 1, § 8, cl. 4.* (hereinafter "*Bankruptcy Clause*").

11 U.S.C. § 363 cannot be sustained as constitutional unless it falls within the grant of congressional power embodied by the *Bankruptcy Clause*.

The Courts below have extended the bankruptcy power too far. When the Courts below determine that the property of a third party, not a creditor or a debtor, and having nothing to do with the bankruptcy process, can be taken, affected, appropriated, or confiscated wholly or partially, for the benefit of the debtor's estate or his creditors, the Courts have gone beyond that which is permissible under the *Bankruptcy Clause*.

The sales under *Section 363* conducted by the Bankruptcy Court below and endorsed by the District and Circuit Courts below purport to allow an action which is far beyond the acceptable expansion of the bankruptcy power. It interferes with property rights held by a third party, a non-debtor/non-creditor stranger to the bankruptcy proceedings, just because that third party's rights may effect the value of the debtor's property rights. If such an intervention were to be

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[5] *U.S.C.A. Const.Amend. 5*

[6] *U.S.C.A. Const.Art. 1, § 8, cl. 4*

allowed there would be no limit to the bankruptcy power. If the *Bankruptcy Clause* gives Congress the power to grant the Bankruptcy Court jurisdiction to authorize a *Section 363* sale under the facts herein, why could not Congress grant the Bankruptcy Court jurisdiction to authorize a trustee to compel a sale of real property adjacent to that of the debtor as part of an assembly where such sale would net the estate a greater sales price for its property than the separate sale of the debtor's property would ? Why could it not permit Congress to authorize the Bankruptcy Court to prohibit an adjacent owner from making the adjacent property available for sale where such prohibition, by decreasing supply, would increase the market value of the debtor's real property ?

The Fifth Amendment: The Takings Clause

The *Takings Clause* of the *Fifth Amendment* provides that "nor shall private property be taken for public use, without just compensation." Although the *Fifth Amendment* speaks only of a taking of private property for a public use, it is settled law that private property could not be taken for other than public use even if just compensation were to be paid. This Court has stated:

> "'one person's property may not be taken for the benefit of another person without justifying public purpose, even though compensation be paid'". *Berman v. Parker, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954).*

There is universal agreement that the power given to Congress by the *Bankruptcy Clause* may not overstep the limitations imposed by the *Due Process* and *Takings Clauses* of the *Fifth Amendment*. Congressional power under the bankruptcy clause, of course, is also limited by such restraints as those of *Article III*, and the *Bill of Rights*. Tribe, *American Constitutional Law (2d ed. 1988)*. See also *Security Industrial, 459 U.S. 70, 103 S.Ct. 407; Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 55 S.Ct. 854, 79 L.Ed. 1593 (1935) reh. denied 296 U.S. 661, 56 S.Ct 82, 80 L.Ed. 471 (1935); Rodrock v. Security Industrial Bank, 642 F.2d*

1193 (10th Cir. 1981); In re Gifford, 669 F.2d 468 (7th Cir. 1982); reh. en banc, 688 F.2d 447; In re Negri, 27 B.R. 941 (Bankr. E.D.N.Y. 1983).

Section 363 of the Bankruptcy Code invokes the *Fifth Amendment* in two distinct ways: just compensation and taking for a public purpose. One should not confuse the "taking" concept with the "compensation" requirement. Even with just compensation, the right to take private property is not limitless. Were this not so, the public use provision in the *Fifth Amendment* would be a nullity. If payment of full or just compensation were all that is required, then government would be able to take any property, for any purpose, private or public, subject only to the payment of just compensation. A purely private taking cannot withstand the scrutiny of the public use requirement; it serves no legitimate purpose of government and thus should be void. This Court should refuse to follow an interpretation that would provide a result such as the one in this case.

Most people know a taking when they see one... After the taking, X's relationship to the object or the land was fundamentally transformed; he could no longer use it at all, and other people could invoke legal arguments and mechanisms to keep him away from it exactly as he had been able to invoke such arguments and mechanisms before the taking had occurred. Tribe, *American Constitutional Law (2d ed. 1988) at 592.*

The sales of the properties that aren't owned by the debtor under *Section 363* of the Bankruptcy Code and the continued sale of such properties violates the *Takings Clause* of the *Fifth Amendment* as being a taking of private property for private purposes and without any form of compensation whatsoever. Not a single dollar from any sale of partnership property or any of the partnership monies were ever seen again. [T]akings for private purpose had widely if not uniformly been regarded as illegal long before the Court held such takings violative of the *Fifth Amendment*... If such public purpose was absent, no compensation could suffice; the taking would have to be set aside. Tribe, *American Constitutional Law (2d ed. 1988) at 589.*

What if legislation were enacted providing that the private property of third parties could be taken for the benefit of debtors and/or creditors in bankruptcy throughout the country as property has been taken here ? Could such legislation be upheld under the *Bankruptcy Clause* or the *Takings Clause* ? Dornfried thinks not. This Court should refuse to honor the interpretations of the law made by the Courts below.

CONCLUSION - WHY THE WRIT SHOULD ISSUE

> *28 U.S.C. § 1334* states: "Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under Title 11".

A voluntary case under a Bankruptcy Code chapter is commenced by the filing with the court of a petition under such chapter by an entity that may be a debtor under such chapter. *11 U.S.C.A. § 301; 8A C.J.S. § 51.*

Ordinarily, when an entity goes bankrupt, there is a bankruptcy petition. However, in this case there is no partnership bankruptcy petition. A voluntary petition may be filed on behalf of a partnership by one or more general partners if all general partners consent to the petition. *Bankr. Rule 1004(a); 11 U.S.C.A. § 301; 8A C.J.S. § 51.* At no time was *11 U.S.C. § 301* and *11 U.S.C. § 303(b)(3)* complied with.

A Petition filed by fewer than all the general partners under *Bankruptcy Rule 1004(b)* to have an order for relief entered with respect to a partnership is referred to as a petition against the partnership because of the adversary character of the proceeding it commences. Cf. *11 § 303(b)(3); 2 Collier Bankruptcy ¶ 303.05[5][a] (15th ed. 1981)*; 2 id. *¶¶ 18.33[2], 18.46 (14th ed. 1966).* An array of procedural safeguards are thereby invoked. These safeguards must not be set aside lightly. A member of the firm is recognized as a party entitled to contest a petition filed against a partnership under subdivision (b) of

Rule 1004 in view of the possible consequences to him of an order for relief against the entity alleged to include him as a member. See *11 U.S.C. § 723*; *Francis v. McNeal, 228 U.S. 695 (1913)*; *Manson v. Williams, 213 U.S. 453 (1909)*; *Carter v. Whisler, 275 Fed. 743, 746-747 (8th Cir. 1921)*.

As a result of an injunction entered February 16, 1995 Mr. Rodney Tow obtained the turnover of property that did not belong to Mr. Stratton, the bankrupt, pursuant to *11 U.S.C. § 542*. As a result of an order entered March 15, 1995 Mr. Rodney Tow received "Authority to Conduct [the] Business" for unlimited purposes and for an unlimited term even though the debtor didn't own the business. No proper notice was ever given to Dornfried and Dornfried was not notified of the hearing date and time. Nor was Dornfried mailed a copy of the Order by the Clerk. At no time was Dornfried served a summons and a copy of the bankruptcy petition of James W. Stratton or any partnership petition. At no time did Dornfried or the partnership receive their due process rights that are guaranteed by the *Fifth Amendment*.

Dornfried and the partnership never consented to the use of cash collateral as required by *11 U.S.C. § 363(c)(2)*. Cash collateral was not segregated as required by *11 U.S.C. § 363(c)(4)*. Adequate protection was never provided as required by *11 U.S.C. § 361*.

On December 2, 1996, Mr. Rodney Tow amended Adversary Proceeding No. 95-4075 to include a cause of action for "Partnership by Estoppel" to pursue the claims that a Partnership Trustee might have against an individual partner; in contravention of the *Rules of Bankruptcy Procedure 1004, 1010, 1011*, and *11 U.S.C. § 303(b)(3)(B)*. *11 U.S.C. § 723* defines the rights of a partnership trustee against the general partners. However, a requirement of the Bankruptcy Code is that the trustee is a partnership trustee, after the proper commencement of a partnership bankruptcy case; not the trustee of an individual debtor partner, as Mr. Rodney Tow is here.

The Bankruptcy Code and its legislative and judicial history emphasize that a partner's property is not part of a partnership's

property, and visa versa. None of the partnership monies or property were ever seen again.

Dornfried has conducted extensive research at the law library and there are no reported decisions of the American Court of a case where the U.S. Bankruptcy Court and the Trustee of an individual debtor partner filed a bankruptcy petition on behalf of a partnership without the consent of any general partner as it did here. In all similar cases at least one general partner signed and filed the partnership bankruptcy petition. There is no provision in the U.S. Bankruptcy Code for the Bankruptcy Court and the Trustee of an individual debtor partner to commence a bankruptcy case against a partnership.

A partnership may file a voluntary bankruptcy petition under chapter 7 or 11. *11 U.S.C. § 301.* A general partner may file an involuntary bankruptcy petition against a partnership. *11 U.S.C. § 303(b)(3).* Only in such a situation are the assets of the partnership part of the estate and subject to the bankruptcy court's control. Only then may a bankruptcy court act to prevent any allegedly wrongful disposition of partnership property. *In re Wallen, 43 B.R. 408 (Bankr. D. Idaho 1984); In re Venture Properties, Inc., 37 B.R. 175 (Bankr. D. New Hampshire 1984).*

As this Court held in *Liberty National Bank of Roanoke, Virginia v. James A. Bear, Trustee in Bankruptcy, 276 U.S. 215, 221 @ n.7, 48 S.Ct. 252, 72 L.Ed. 536, 1927,:*

> *n.7* Sec. 5 of the present Act,[7] which was substituted for § 36 of the Law of 1867,[8] reads as follows:
>
> "*Sec.5.h.* In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy,

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[7] *Bankruptcy Act of July 1, 1898.*

[8] *Bankrupt Law of March 2, 1867.*

unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt." {Emphasis added}.

As the solvent partner, Dornfried has the right to wind up the affairs of the partnership and to possession of all of its property. If Mr. Rodney Tow is aggrieved by the way Dornfried conducts the winding-up and final accounting then he has the right to petition the courts of the State of Texas for relief; the very same right Mr. Stratton has or had.

Because there is no partnership bankruptcy petition and an improper and unauthorized partnership bankruptcy case was commenced without the consent of any of the general partners bankruptcy Case No. 95-40191-H4-7 must be dismissed pursuant to *11 U.S.C. § 707*. This Court should order the return of the property that Mr. Rodney Tow received as of the commencement of the case that is not owned by James W. Stratton pursuant *11 U.S.C. § 349(b)*. No prejudice will result to any party by the granting of this Writ of Mandamus or Prohibition. Accordingly, Dornfried prays for the return of all of the $23,669,405.00 of partnership property that doesn't belong to James W. Stratton.

RESPECTFULLY SUBMITTED,
The Petitioner,

Mark S. Dornfried, pro se
16720 Stuebner Airline Rd., # 185
Spring, TX 77379
Telephone and Fax: (281) 251-6534

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-20127

In Re: MARK S. DORNFRIED

Petitioner

Petition for a Writ of Mandamus to the United States District Court for the Southern District of Texas, Houston

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Before WIENER, BARKSDALE and EMILIO M. GARZA, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for a writ of mandamus is DENIED.

IT IS FURTHER ORDERED that the motion of trustee, Rodney D. Tow, to dismiss the petition for a writ of mandamus is DENIED AS MOOT.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§
	§
JAMES W. STRATTON D/B/A	§
FIRST HOUSTON HOLDINGS,	§
	§
Debtor	§
	§
	§
MARK S. DORNFRIED,	§
	§
Appellant	§
	§
VS.	§
	§
RODNEY D. TOW, TRUSTEE,	§
	§
Appellee	§

ORDER OF DISMISSAL

The above referenced action is an appeal of a December 11, 1996 order from the bankruptcy court denying pro se Appellant Mark S, Dornfried's ("Dornfried's") motion to dismiss the petition in the Stratton bankruptcy because Dornfried did not consent to James W. Stratton's individual filing[1] first of a Chapter 11 petition and then of a voluntary Chapter 7 petition. Specifically, the issues Dornfried raises on

[1] In Dornfried's "Motion to Dismiss the Petition," Dornfried states that the case was filed as an individual voluntary petition.

appeal are "[c]an a Bankruptcy Court switch the individual Chapter 7 bankruptcy petition of an alleged general partner to a voluntary Chapter 7 partnership petition without the consent of all of the alleged general partners; as the trustee has requested in Adversary No. 95-4075" and "[a]bsent such consent isn't the Bankruptcy Court required to dismiss the bankruptcy petition?" [2]

Pending before the Court are the following motions: Dornfried's motion to remand for findings of fact and conclusions of law (#2); Rodney Tow, Trustee's ("Tow's") motion to supplement designation of record for appeal (#5); and Tow's motion to dismiss appeal (#6).

Because no opposition has been filed to the motion to supplement, it is granted.

Tow moves to dismiss this action for the following reasons: (a) Dornfried lacks standing to request a dismissal of the Stratton bankruptcy; (2) this is an appeal of an interlocutory order for which Appellant failed to obtain leave to file the appeal, as require by Bankruptcy Rule 8003,[3] and thus the Court lacks jurisdiction to hear

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[2] Tow observes that Dornfried correctly states that the third amended complaint in the adversary proceeding seeks to establish a "partnership by estoppel"

[3] Bankruptcy Rule 8001 authorizes appeals to be taken from final judgments only unless, with respect to an interlocutory judgment, the notice of appeal is accompanied by a motion for leave to appeal. Bankruptcy Rule 8003 sets out the requirements for a motion for leave to appeal: (1) a statement of the facts necessary to an understanding of the questions to be presented by the appeal; (2) a statement of those questions and of the relief sought; (3) a statement why an appeal should be granted; and (4) a copy of the order and of any related opinion or memorandum. Tow maintains that Dornfried failed to satisfy all four elements. Moreover, in Matter of Ichinose, 946 F.2d 1169, 176-77 (5th Cir. 1991), the Fifth Circuit suggested that the standard of 28 U.S.C. § 1291 for interlocutory appeals from district court orders could serve as a guide. For an appeal to be appropriate, a controlling issue of law

this appeal; and (3) Dornfried failed to comply with Bankruptcy Rule 8010 in that he failed to state the issues on appeal and he failed to state the applicable standard of review.[4]

Regarding the standing issue, Tow contends that Dornfried is only a defendant in an adversary proceeding in which the estate is seeking a substantial recovery against him, as the partner of the Debtor, for fraud against the estate and against the creditors of the estate. Dornfried did not file a proof of claim in this estate and is therefore not entitled as a creditor to a distribution from the estate. The last date to file a claim was January 15, 1996. Appellate review is limited to those persons whose interests are directly affected. In re Fondiller, 707 F.2d 441 (9th Cir. 1983)(appellant's only demonstrable interest in bankruptcy court order authorizing appointment of special counsel was as a potential party defendant in an adversary proceeding, and he was therefore not a person "aggrieved" by the attorney's appointment). Here, Tow argues by analogy, Dornfried is merely a party defendant in an adversary proceeding and is not a party aggrieved by the continuation of the bankruptcy, thus lacking standing to bring this appeal. Moreover, Dornfried failed to serve the creditors and parties in interest with his motion to dismiss appeal [sic].

Under 28 U.S.C. § 158(a), a district court's appellate jurisdiction is limited to final orders of the bankruptcy court unless leave to appeal an interlocutory order is granted. Tow argues that Dornfried failed to

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must be involved, there must be a substantial ground for difference of opinion on the question, and an immediate appeal must materially advance the ultimate termination of the litigation. Tow insists that Dornfried has also failed to meet these requirements.

[4] That standard in respect to factual questions is "clearly erroneous," and with respect to legal issues , "de novo." In re Topco, Inc., 849 F.2d 727 (5th Cir. 1990). The standard of review for a motion to dismiss is abuse of discretion. In re Zick, 931 F.2d 1124, 1126 (6th Cir. 1991); In re Atlas Supply Corp., 857 F.2d 1061, 1063 (5th Cir. 1988).

seek leave of court to pursue this appeal and therefore the Court lacks jurisdiction to hear the appeal. Moreover, because the denial of the motion to dismiss the Chapter 7 bankruptcy does not finally dispose of the case, the order is interlocutory. In re Kutner, 656 F.2d 1107 (5th Cir. 1981). Dornfried has not satisfied the requirements of Bankruptcy Rule 8003 for a motion for leave to appeal because he has failed to file a statement of facts necessary for questions raised by the appeal to be understood, a statement of the relief sought, and a statement of the reasons why the appeal should be granted.

Nor, Tow asserts, has Dornfried complied with Bankruptcy Rule 8010, thereby making it impossible for Tow to respond with any certainty and clarity because Tow does not know why Dornfried is appealing the decision or what facts he is relying on to support his endeavor to convert the individual Stratton filing to a partnership filing.

Tow further speculates that Dornfried is claiming that by filing the adversary proceeding, Tow is attempting to convert Stratton's individual filing to a partnership filing. Insisting that such a conversion cannot be done, he maintains that the purpose of the adversary is to liquidate the damages that Dornfried and other partners owe to the estate and that the claim of partnership by estoppel is to establish liability and damages. If Tow has taken control of properties that Dornfried claims do not belong to the estate, Dornfried may file appropriate motions with the bankruptcy court to have the injunction altered, as he has on other occasions.

Moreover Tow contends that Dornfried's motion to dismiss the bankruptcy petition is legally deficient because it fails to state a sufficient cause. Debtor filed an individual petition, not a partnership petition, so any issue of Dornfried's or any other partner's consent is irrelevant. Moreover dismissal would prejudice the creditors by causing loss of assets otherwise available to them. Tow also points out that Dornfried failed to serve all the creditors with his motion to dismiss, so they were not given an opportunity to consent. Tow concludes that the motion to dismiss was properly denied by Judge Greendyke.

Citing general propositions of law without clearly relating them to the issues here, Dornfried globally contends that the bankruptcy court orders diminish his property, increase his burdens, and detrimentally affect his rights, thus giving him standing. As a solvent alleged partner, he further insists that he has the right to wind up the affairs of the alleged partnership and to possess all of its property.

This Court would point out that the bankruptcy court is trying to determine what property belongs to Mr. Stratton, individually, and what belongs to other persons or entities. Dornfried can assert his ownership interest in the bankruptcy proceedings. When the bankruptcy judge makes a final determination as to the assets of the estate and those belonging to Dornfried and others, Dornfried is entitled to appeal.

Meanwhile the Court concurs with Tow that Dornfried lacks standing to appeal a bankruptcy court order denying Dornfried's motion to dismiss the bankruptcy filed by Stratton individually and that this Court lacks jurisdiction over the instant appeal of the interlocutory order.

Accordingly, for the reasons indicated above, the Court ORDERS that Tow's motion to supplement is GRANTED and that this action is DISMISSED for lack of standing and for lack of jurisdiction because Dornfried failed to obtain leave of the bankruptcy court to file this appeal. All other pending motions are MOOT.

SIGNED this 11th day of April, 1997, at Houston, Texas.

/s/ Melinda Harmon
Melinda Harmon
United States District Court

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:

JAMES W. STRATTON
d/b/a FIRST HOUSTON HOLDINGS

CASE NO. 95-40191-H4-7
(CHAPTER 7)

ORDER

It is hereby **ORDERED, ADJUDGED, AND DECREED** that

The bankruptcy petition is dismissed.

Dated this ___ day of _____, 199_.

WILLIAM GREENDYKE
U.S. BANKRUPTCY JUDGE

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denied.
WG
12/9/96

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE: CASE NO. 95-40191-H4-7

JAMES W. STRATTON DBA
FIRST HOUSTON HOLDINGS (CHAPTER 7)

ORDER ON TRUSTEE' MOTION FOR AUTHORITY
TO CONDUCT BUSINESS

CAME ON TO BE HEARD Trustee's motion for authority to conduct the business of the debtor. Having heard arguments of counsel and reviewed the available evidence and it being demonstrated to the Court that the operation of the debtor's business is in the best interest of the estate and consistent with the orderly liquidation of the estate, the Court is of the opinion that the motion should be granted.

IT IS THEREFORE ORDERED that the trustee is granted authority to conduct the debtor's business and to pay the necessary expenses incurred in the operation of the business.

SIGNED on 11th day of March 1995.

/s/ William Greendyke
WILLIAM GREENDYKE
UNITED STATES BANKRUPTCY JUDGE

Case: 95-40191 Form ID: 122 Nte Date: 03/15/95 Off: 4
Page1

Total notices mailed: 4

Debtor	Stratton, James W	40 Niles Dr.	Manchester, CT 06040
Trustee	Tow, Rodney D.	709 N. San Jacinto	Conroe, TX 77301
Aty	Simonsen, Stephen A. Atty at Law 709 N. San Jacinto Conroe, TX 77301		
Intereste	US Trustee,	440 Louisiana, Suite 2500	Houston, TX 77002

———— • ————

11 U.S.C. § 101(41) states:

Definitions. In this title-
(41) "person" includes individual, partnership, and corporation...

———— • ————

11 U.S.C. § 303 states:

INVOLUNTARY CASES.

(b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title-

(3) if such person is a partnership-

(A) by fewer than all of the general partners in such partnership; or

(B) if relief has been ordered under this title with respect to all of the general partners in such partnership, by a general partner in such partnership, the trustee of such a general partner, or a holder of a claim against such partnership...

Legislative History

Subsection (b) of this section specifies who may file an involuntary petition. If all of the general partners in a partnership are in bankruptcy, then the trustee of a single general partner may file an involuntary petition against the partnership. {Emphasis added}.

11 U.S.C. § 303(d) states:

The debtor, or a general partner in a partnership debtor that did not join in the petition, may file an answer to a petition under this section.

Legislative History

Subsection (d) permits the debtor to file an answer to an involuntary petition. The subsection also permits a general partner in a partnership debtor to answer an involuntary petition against the partnership if he did not join in the petition. Thus, a partnership petition by less than all of the general partners is treated as an involuntary, not a voluntary, petition.

11 U.S.C. § 361 states:

ADEQUATE PROTECTION.

When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by-

(1) requiring the trustee to make a cash payment or periodic payments to such entity, to the extent that... use, sale, or lease under section 363 of this title... results in a decrease in the value of such entity's interest in such property;

(2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease or grant results in a decrease in the value of such entity's interest in such property; or

(3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

———— • ————

11 U.S.C. § 363(a) defines "Cash Collateral" as:

In this section "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offsprings, rents, or profits of property subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

———— • ————

11 U.S.C. § 363(c)(2) states:

The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless-

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

———— • ————

11 U.S.C. § 363(c)(4) states:

Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

———— • ————

11 U.S.C. § 363(h) states:

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if-

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

11 U.S.C. § *721* states:

§ 721. Authorization to operate business.

The court may authorize the trustee to operate the business of the debtor for a limited time, if such operation is in the best interest of the estate and consistent with the orderly liquidation of the estate. {Emphasis added}.

11 U.S.C. § *723* states:

§ 723. Rights of partnership trustee against general partners.

(a) If there is a deficiency of property of the estate to pay in full all claims which are allowed in a case under this chapter concerning a partnership and with respect to which a general partner of the partnership is personally liable, the trustee shall have a claim against such general partner for the full amount of the deficiency. {Emphasis added}.

Rule 1004 states:

PARTNERSHIP PETITION.

(a) Voluntary Petition. A voluntary petition may be filed on behalf of the partnership by one or more general partners if all general partners consent to the petition.

(b) Involuntary Petition: Notice and Summons. After filing of an involuntary petition under § *303(b)(3)* of the Code,

(1) the petitioning partners or other petitioners shall cause forthwith a copy of the petition to be sent or served on each general partner who is not a petitioner; and

(2) the clerk shall issue forthwith a summons for service on each general partner who is not a petitioner.

Rule 1010 applies to the form and service of the summons. {Emphasis added}.

———— • ————

Bankruptcy Rule 1010 states:

SERVICE OF INVOLUNTARY PETITION AND SUMMONS; PETITION COMMENCING ANCILLARY CASE

On the filing of an involuntary petition or a petition commencing a case ancillary to a foreign proceeding the clerk shall forthwith issue a summons for service. When an involuntary petition is filed, service shall be made on the debtor. When a petition commencing an ancillary case is filed, service shall be made on the parties against whom relief is sought pursuant to § 304(b) of the Code and on any other parties as the court may direct. The summons shall be served with a copy of the petition in the manner provided for service of a summons and complaint by *Rule 7004(a) or (b)*. If Service cannot be so made, the court may order that the summons and petition may be served by mailing copies to the party's last known address, and by at least one publication in a manner and form directed by the court. The summons and petition may be served on the party anywhere. *Rule 7004(f)* and *Rule 4(g) and (h)* F.R. Civ. P. apply when service is made or attempted under this rule.

Bankruptcy Rule 1011 states:

RESPONSIVE PLEADING OR MOTION IN INVOLUNTARY AND ANCILLARY CASES

(a) Who may contest a petition. The debtor named in an involuntary petition or a party in interest to a petition commencing a case ancillary to a foreign proceeding may contest the petition. In the case of a petition against a partnership under Rule 1004(b), a nonpetitioning general partner, or a person who is alleged to be a general partner but denies the allegation, may contest the petition.

(b) Defenses and Objections; When presented. Defenses and objections to the petition shall be presented in the manner prescribed by Rule 12 F.R.Civ.P. and shall be filed and served within 20 days after service of the summons, except that if service is made by publication on a party or partner not residing or found within the state in which the court sits, the court shall prescribe the time for filing and serving the response.

(c) Effect of Motion. Service of a motion under Rule 12(b) F.R. Civ. P. shall extend the time for filing and serving a responsive pleading as permitted by Rule 12(a) F.R. Civ. P.

(d) Claims against petitioners. A claim against a petitioning creditor may not be asserted in the answer except for the purpose of defeating the petition.

(e) Other Pleadings. No other pleadings shall be permitted, except that the court may order a reply to an answer and prescribe the time for filing and service. {Emphasis added}.

Advisory Committee Note

This rule is derived from former Bankruptcy Rule 112. A Petition filed by fewer than all the general partners under Rule 1004(b) to have an order for relief entered with respect to the partnership is referred to as a petition against the partnership because of the adversary character of the proceeding it commences. Cf. § 303(b)(3) of the Code; 2 Collier Bankruptcy ¶ 303.05[5][a] (15th ed. 1981); 2 id. ¶¶ 18.33[2], 18.46 (14th ed. 1966). One who denies an allegation of membership in the firm is nevertheless recognized as a party entitled to contest a petition filed against a partnership under subdivision (b) of Rule 1004 in view of the possible consequences to him of an order for relief against the entity alleged to include him as a member. See § 723 of the Code; Francis v. McNeal, 228 U.S. 695 (1913); Manson v. Williams, 213 U.S. 453 (1909); Carter v. Whisler, 275 Fed. 743, 746-747 (8th Cir. 1921).

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Connecticut Bankruptcy Local Rule 10 states:

CORPORATE OR PARTNERSHIP RESOLUTION.

A voluntary petition or consent to an involuntary petition field by a corporation or partnership shall be accompanied by a copy of the corporate resolution or other appropriate authorization duly attested to, authorizing such filing.

———— • ————

VERNON'S TEXAS STATUTES AND CODES ANNOTATED
CIVIL STATUTES
TITLE 105--PARTNERSHIPS AND JOINT STOCK COMPANIES
CHAPTER ONE--PARTNERSHIPS
TEXAS REVISED PARTNERSHIP ACT
ARTICLE II. NATURE OF PARTNERSHIP

Current through end of 1995 Reg. Sess.

Art. 6132b-2.01. Partnership as Entity

A partnership is an entity distinct from its partners.

VERNON'S TEXAS STATUTES AND CODES ANNOTATED
CIVIL STATUTES
TITLE 105--PARTNERSHIPS AND JOINT STOCK COMPANIES
CHAPTER ONE--PARTNERSHIPS
TEXAS REVISED PARTNERSHIP ACT
ARTICLE II. NATURE OF PARTNERSHIP

Current through end of 1995 Reg. Sess.

Art. 6132b-2.04. Partnership Property not Property of Partners

Partnership property is not property of the partners. Neither a partner nor a partner's spouse has an interest in partnership property.

HISTORICAL NOTES

COMMENT OF BAR COMMITTEE-1993

This section states directly that partnership property is not property of the partners. This is a clarifying statement intended to eliminate any confusion that may have existed under TUPA as a result of its combination of the aggregate and entity concepts of partnerships. It is consistent with the effect of TUPA § 25(2). Much of the language of TUPA §§ 24 to 25 relating to the partners' rights or lack of rights in partnership property has been eliminated in favor of the simple direct statement that partnership property is not the property of the partners. No substantive change from TUPA §§ 24 to 25 in intended.

VERNON'S TEXAS STATUTES AND CODES ANNOTATED
CIVIL STATUTES
TITLE 105--PARTNERSHIPS AND JOINT STOCK COMPANIES
CHAPTER ONE--PARTNERSHIPS
ART. 6132B. TEXAS UNIFORM PARTNERSHIP ACT
PART V--PROPERTY RIGHTS IN PARTNERSHIP

Current through End of 1995 Reg. Sess.

Art. 6132b, § 25. Nature of a Partner's Right in Specific Partnership Property

(1) A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.

(2) The incidents of this tenancy are such that:

(a) A partner, subject to the provisions of this Act and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

(b) A partner's right in specific partnership property is not assignable except in connection with the assignment of rights of all the partners in the same property.

(c) A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt the partners, or any of them, or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws.

(d) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.

(e) A partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin. {Emphasis added}.

VERNON'S TEXAS STATUTES AND CODES ANNOTATED
CIVIL STATUTES
TITLE 105--PARTNERSHIPS AND JOINT STOCK COMPANIES
CHAPTER ONE--PARTNERSHIPS
ART. 6132B. TEXAS UNIFORM PARTNERSHIP ACT
PART VI--DISSOLUTION AND WINDING UP

Current through end of 1995 Reg. Sess.

Art. 6132b, § 31. Causes of Dissolution

Sec. 31. Dissolution is caused:

(1) Without violation of the agreement between the partners,

(a) By the termination of the definite term or particular undertaking specified in the agreement,

(b) By the express will of any partner when no definite term or particular undertaking is specified,

(c) By the express will of all the partners who have not assigned their interests or suffered them to be charged for

their separate debts, either before or after the termination of any specified term or particular undertaking,
(d) By the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners;

(2) In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this Section, by the express will of any partner at any time;

(3) By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership;

(4) By the death of any partner unless the agreement between the partners provides otherwise;

(5) By the bankruptcy of any partner or the partnership;

(6) By decree of court under Section 32.
{Emphasis added}.

VERNON'S TEXAS STATUTES AND CODES ANNOTATED
CIVIL STATUTES
TITLE 105--PARTNERSHIPS AND JOINT STOCK COMPANIES
CHAPTER ONE--PARTNERSHIPS
ART. 6132B. TEXAS UNIFORM PARTNERSHIP ACT
PART VI--DISSOLUTION AND WINDING UP

Current through End of 1995 Reg. Sess.

Art. 6132b, § 35. Power of Partner to Bind Partnership to Third Persons After Dissolution

(1) After dissolution a partner can bind the partnership except as provided in paragraph (3):

(3) The partnership is in no case bound by any act of a partner after dissolution:

(b) Where the partner has become bankrupt;

VERNON'S TEXAS STATUTES AND CODES ANNOTATED
CIVIL STATUTES
TITLE 105--PARTNERSHIPS AND JOINT STOCK COMPANIES
CHAPTER ONE--PARTNERSHIPS
ART. 6132B. TEXAS UNIFORM PARTNERSHIP ACT
PART VI--DISSOLUTION AND WINDING UP

Current through end of 1995 Reg. Sess.

Art. 6132b, § 37. Right to Wind Up

Sec. 37. Unless otherwise agreed the partners who have not wrongfully dissolved the partnership or the legal representative of the last surviving partner, not bankrupt, has the right to wind up the partnership affairs; provided, however, that any partner, his legal representative or his assignee, upon cause shown, may obtain winding up by the court. {Emphasis added}.

VERNON'S TEXAS STATUTES AND CODES ANNOTATED
CIVIL STATUTES
TITLE 105--PARTNERSHIPS AND JOINT STOCK COMPANIES
CHAPTER ONE--PARTNERSHIPS
ART. 6132B. TEXAS UNIFORM PARTNERSHIP ACT
PART VI--DISSOLUTION AND WINDING UP

Current through End of 1995 Reg. Sess.

Art. 6132b, § 40. Rules for Distribution

Sec. 40. In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:

(a) The assets of the partnership are:

(I) The partnership property,

(II) The contributions of the partners necessary for the payment of all the liabilities specified in clause (b) of this paragraph.

(b) The liabilities of the partnership shall rank in order of payment, as follows:

(I) Those owing to creditors other than partners,

(II) Those owing to partners other than for capital and profits,

(III) Those owing to partners in respect of capital,

(IV) Those owing to partners in respect of profits.

(c) The assets shall be applied in the order of their declaration in clause (a) of this paragraph to the satisfaction of the liabilities.

(d) The partners shall contribute, as provided by Section 18(a) the amount necessary to satisfy the liabilities; but if any, but not all, of the partners are insolvent, or, not being subject to process, refuse to contribute, the other partners shall contribute their share of the liabilities, and, in the relative proportions in which

they share the profits, the additional amount necessary to pay the liabilities.

(i) Where a partner has became bankrupt or his estate is insolvent the claims against his separate property shall rank in the following order:

(I) Those owing to separate creditors,

(II) Those owing to partnership creditors,

(III) Those owing to partners by way of contribution.

{Emphasis added}.